Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Consumer and Governmental Affairs Bureau Seeks Further Comment on Interpretation of the Telephone Consumer Protection Act in Light of the Ninth Circuit's *Marks v. Crunch San Diego, LLC* Decision	)	CG Docket No. 18-152
	)	
Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991	)	CG Docket No. 02-278

REPLY COMMENTS OF THE STUDENT LOAN SERVICING ALLIANCE; NAVIENT CORP.; NELNET SERVICING, LLC; AND PENNSYLVANIA HIGHER EDUCATION ASSISTANCE AGENCY

I. Introduction.

The Student Loan Servicing Alliance ("SLSA"); Navient Corp. ("Navient"); Nelnet Servicing, LLC ("Nelnet"); and the Pennsylvania Higher Education Assistance Agency ("PHEAA") respectfully submit these Reply Comments in response to the Public Notice released on October 3, 2018, by the Federal Communications Commission ("FCC" or "Commission") Consumer & Governmental Affairs Bureau in the above-captioned proceedings.[1] A variety of stakeholders agree on the appropriate definition of an "automatic telephone dialing system" ("ATDS") and that the Commission should reject the Ninth Circuit's expansive and unsupported interpretation.[2] Consistent with the TCPA's statutory text and legislative history, the

[1] *Consumer and Governmental Affairs Bureau Seeks Further Comment on Interpretation of the Telephone Consumer Protection Act in Light of the Ninth Circuit's Marks v. Crunch San Diego, LLC Decision*, Public Notice, CG Docket Nos. 02-278, 18-152 (CGB rel. Oct. 3, 2018) ("Public Notice").

[2] *See generally* Comments of ACA International, CG Docket No. 18-152, CG Docket No. 02-278, at 7 (filed Oct. 17, 2018); Comments of ADT LLC d/b/a/ ADT Security Services, CG Docket No. 18-152, CG Docket No. 02-278, at 5–7 (filed Oct. 17, 2018); Comments of the American Financial Services Association and the Consumer Mortgage Coalition, CG Docket No. 18-152, CG Docket No. 02-278, at 4–6 (filed Oct. 17, 2018) ("AFSA Comments"); Comments of Allstate Insurance Company, CG Docket No.

Commission should clarify that equipment qualifies as an ATDS only if it actually has the functionality to (i) to store or produce numbers to be called, using a random or sequential number generator, and (ii) to dial those numbers. Significantly, and contrary to *Marks* and pro-plaintiff comments, automated calling equipment can in fact "store" numbers "using a random or sequential number generator."[3] Thus, when the technical functions of an ATDS are properly understood, a plain reading of the statutory definition makes perfect sense and conforms to congressional intent. Had Congress wanted to include in the ATDS definition predictive dialers and other devices that call from lists, it easily could have done so. Yet, the term "lists" appears nowhere in the text, and no amount of extratextual analysis changes this.

Moreover, despite plaintiff's lawyers' efforts to equate debt servicing calls with telemarketing calls, they are not the same. In enacting the TCPA, Congress sought to combat abusive telephone solicitations, not stop businesses from communicating with consumers with

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18-152, CG Docket No. 02-278, at 1 (filed Oct. 17, 2018); Comments of the A to Z Communications Coalition and the Insights Association, CG Docket No. 18-152, CG Docket No. 02-278, at 8–9 (filed Oct. 17, 2018); Comments of CallFire, Inc., CG Docket No. 18-152, CG Docket No. 02-278, at 3–4 (filed Oct. 17, 2018); Comments of the Consumer Bankers Association, CG Docket No. 18-152, CG Docket No. 02-278, at 2 (filed Oct. 17, 2018); Comments of Encore Capital Group, CG Docket No. 18-152, CG Docket No. 02-278, at 2–5 (filed Oct. 16, 2018); Comments Five9, Inc., CG Docket No. 18-152, CG Docket No. 02-278, at 4 (filed Oct. 16, 2018); Comments of the International Health, Racquet, and Sportsclub Association (IHRSA), CG Docket No. 18-152, CG Docket No. 02-278, at 1–2 (filed Oct. 17, 2018); Comments of the Insurance Coalition, CG Docket No. 18-152, CG Docket No. 02-278, at 1 (filed Oct. 17, 2018); Comments of the Internet & Television Association (NCTA), CG Docket No. 18-152, CG Docket No. 02-278, at 4–5 (filed Oct. 17, 2018); Comments of Noble Systems Corporation, CG Docket No. 18-152, CG Docket No. 02-278, at 18 (filed Oct. 16, 2018) ("Noble Comments"); Comments of the Ohio Credit Union League, CG Docket No. 18-152, CG Docket No. 02-278, at 3 (filed Oct. 17, 2018); Comments of the Professional Association for Customer Engagement, CG Docket No. 18-152, CG Docket No. 02-278, at 4 (filed Oct. 17, 2018); Comments of Sirius XM Radio Inc., CG Docket No. 18-152, CG Docket No. 02-278, at 2 (filed Oct. 17, 2018); Comments of TCN Inc., CG Docket No. 18-152, CG Docket No. 02-278, at 2 (filed Oct. 17, 2018); Comments of Third Federal Savings and Loan, CG Docket No. 18-152, CG Docket No. 02-278, at 2 (filed Oct. 17, 2018); Comments of the U.S. Chamber Institute for Legal Reform, CG Docket No. 18-152, CG Docket No. 02-278, at 10–11 (filed Oct. 17, 2018); Comments of the Wisconsin Credit Union League, CG Docket No. 18-152, CG Docket No. 02-278, at 2 (filed Oct. 16, 2018); Comments of the Credit Union National Association, CG Docket No. 18-152, CG Docket No. 02-278, at 1-2 (filed Oct. 16, 2018).

[3] Noble Comments at 1, 26.

whom they have relationships. This is clear, not only from the TCPA's legislative history, but also from the distinct restrictions placed on telemarketing—many of which apply regardless of the nature of the device used to place the solicitation.

II. Random and Sequential Number Generators Can Store Numbers to Be Dialed.

Plaintiff's firms and consumer groups argue that the modifying phrase "using a random or sequential number generator" in the statutory definition of an ATDS can only modify the term "produce"—and not "store"—because a random or sequential number generator cannot store numbers.[4] Thus, according to them, an ATDS includes devices that merely dial from stored lists of numbers.[5] As plaintiff's counsel in *Marks* put it, "storing telephone numbers using a random or sequential number generator is nonsensical."[6] The Ninth Circuit credited this argument in concluding that the "definition of ATDS includes a device that stores telephone numbers to be called, whether or not those numbers have been generated by a random or sequential number generator."[7] This understanding of the technology is incorrect, and *Marks* analysis, therefore, is inherently flawed and unpersuasive.

For example, the comments filed by Noble Systems undertake a detailed technical examination of the capabilities of autodialers at the time of the TCPA's passage and persuasively demonstrate that "random and sequential number generators used by telephone dialers in that era

[4] *See, e.g.*, Comments of Law Offices of Todd M. Friedman, P.C., Kazerouni Law Group, APC, and Hyde & Swigart, APC, CG Docket Nos. 18-152, 02-278, at 2 (filed October 17, 2018) ("Kazerouni Comments"); Comments of National Consumer Law Center, CG Docket Nos. 18-152, 02-278, at 4 (arguing that number generation and storage are mutually exclusive) (filed October 17, 2018) ("NCLC Comments").

[5] Kazerouni Comments at 15; NCLC Comments at 3.

[6] Kazerouni Comments at 18.

[7] *Marks*, 2018 WL 4495553, at *8 ("Marks points out that a number generator is not a storage device; a device could not use "a random or sequential number generator" to store telephone numbers. Therefore, Marks asserts, it does not make sense to read "store" in subdivision (A) as applying to "telephone numbers to be called, using a random or sequential number generator.").

both 'produced' and 'stored' numbers."[8] The comments explain that digital dialing systems "stored the random/sequential numbers they produced for dialing" as an inherent function of the digital circuitry used to produce such numbers.[9] The comments note that storing numbers ensured that the random dialing of numbers—for example, randomly dialing all of the numbers in a 10,000 number block—would not result in the same number being repeatedly called.[10] Noble also highlights the need for statutory language to address indiscriminate dialing resulting from both the storage and production of numbers using a random or sequential number generator.[11] Succinctly stated, "Congress addressed this by defining the scope of the ATDS to encompass either implementation."[12] Noble's technical analysis should remove any hesitation the Commission may have to give full effect to the plain language of the TCPA and conclude that an ATDS must utilize a random or sequential number generator.[13] Further, the Commission should clarify that only calls or texts made using this autodialing functionality are made "using" an ATDS.[14]

[8] Noble Comments at 1.

[9] *Id.* at 11.

[10] *Id.* at 12-15.

[11] Noble Comments at 15-16; AFSA Comments at 6.

[12] Noble Comments at 16.

[13] *See, e.g.*, Sutherland Statutory Construction § 47:29 (7th ed.) ("Technical terms or terms of art in a statute have their technical meaning, absent legislative intent to the contrary, or other overriding evidence of a different meaning.").

[14] Even NCLC apparently concedes that the term "capacity" in the statutory definition of an ATDS should include only the device's actual functionalities at the time of the call or text. *See* NCLC Comments at 8 ("Using Chairman Pai's articulation of the term, the potential ability for the system to perform the functions of an ATDS at some time in the future, if additional software or hardware were added to one of the systems on the smartphone is not relevant.").

III. Congress Chose Not to Include Predictive Dialers in the ATDS Definition.

Predictive dialers were pervasive in the telephony industry when the TCPA was enacted.[15] Some commenters argue that congressional knowledge of the existence of predictive dialers evidences an intent to include equipment that calls from lists within the definition of an ATDS.[16] A contrary conclusion is appropriate. Congress's refusal to include the capability of calling from lists, despite knowledge of the existence of such capabilities, more demonstrates an intent to exclude such equipment from the ATDS definition.

At any rate, a review of the testimony before Congress shows that Congress's concern with predictive dialers was limited to the equipment's potential for "dead air" and abandoned calls.[17] Congress addressed that issue separately by placing express limits on the abandonment of telemarketing calls irrespective of the device used to place the call.[18] This testimony suggests that Congress did not consider a predictive dialer to be an ATDS.

The plaintiff's attorneys attempt to buttress their conclusion that ATDS must include predictive dialers with a citation to the FCC's original ruling in 1992.[19] The only mention of predictive dialers in that ruling is in a section titled "Procedures for Avoiding Unwanted Telephone Solicitations to Residences," and the discussion there focuses on whether "live

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[15] *See, e.g.*, Comments of Jeffrey A. Hansen, CG Docket Nos. 18-152, 02-278, at 4 (filed October 17, 2018) ("Hansen Comments") (stating "predictive dialers always called from lists of numbers and that issue seemed to be settled in 1992. Predictive dialers, as they are today, where invented in 1974 and heavily marketed . . . throughout the 1980's.").

[16] *See, e.g.*, Kazerouni Comments at 12-13; *see also* Hansen Comments at 7.

[17] *See* The Automated Tel. Consumer Protection Act of 1991, Hrg. Before the Subcomm. on Commc'ns of the Comm. on Commerce, Science, and Transp., S. 102-960, at 16, 19 (July 24, 1991) (Statement of Robert Bulmash, Private Citizen, Inc.).

[18] 47 C.F.R. 64.1200(a)(7) ("No person or entity may . . . Abandon more than three percent of all telemarketing calls that are answered live by a person, as measured over a 30-day period for a single calling campaign. . . . A call is 'abandoned' if it is not connected to a live sales representative within two (2) seconds of the called person's completed greeting.").

[19] Kazerouni Comments at 7 n.3.

solicitations, *particularly those made by predictive dialers (which deliver calls to live operators),* and solicitations completed by artificial or prerecorded voice messages" should both be subject to the do-not-call-list prohibitions.[20] The Commission did not address whether a predictive dialer is an ATDS in the 1992 order. Moreover, the Commission's 1992 order made clear that ATDS are limited to equipment that randomly or sequentially generated numbers, explaining that "[t]he prohibitions of § 227(b)(1) clearly do not apply [where] the numbers called are not generated in a random or sequential fashion."[21]

IV. Congress Targeted Telemarketing, not Debt Servicing Calls.

Once again, plaintiff's attorneys have used the Commission's request for comments on critical TCPA issues to equate telemarketing with debt servicing calls.[22] However, the important and time-sensitive calls and texts that loan servicers make to borrowers are in no way similar to abusive telemarketing tactics that rely on autodialers. As described in detail in our Petition for Reconsideration filed in the Commission's federal debts proceeding and prior comments, student loan servicers play an important role in keeping at-risk borrowers out of delinquency and default.[23] For example, through modern-dialing technology, servicers can effectively educate

[20] Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991, 7 F.C.C. Rcd. 8752, 8755-58 (1992) (emphasis added).

[21] *See id.* at 8776-77.

[22] *See, e.g.*, Kazerouni Comments at 13 ("The FCC should not permit companies and individuals, especially in the telemarketing and debt collection industry to undue the meaning of an ATDS . . . ."); *id.* at 16 ("Debt collectors and telemarketers do not want to contact people at random . . ."); *id.* at 17 (Hundreds or even thousands of text messages in a short period of time can be send out to people whose telephone numbers get added to a list by companies such as telemarketers and debt collectors"); *id.* at 24 ("[P]redictive dialers are used commonly in the telemarketing and debt collection industries.").

[23] *See* Petition for Reconsideration of Great Lakes, Navient, Nelnet, PHEAA, and SLSA, CG Docket No. 02-278, at (filed Dec. 16, 2016).

borrowers on the myriad repayment options that are available to them.[24] These non-marketing calls help consumers avoid the damaging effects of falling behind on their loans.

Moreover, the TCPA was not intended to limit calls to service or collect debts, such as student loans.[25] Instead, Congress targeted unsolicited telemarketing calls—especially those using an automated message—as the primary ill the TCPA sought to cure.[26] Congress recognized a critical distinction between calls from telemarketers with whom the consumer had no relationship, and hence no expectation of a call, and calls from entities with whom the consumer had transacted business and provided a phone number to be called. This distinction is only made plainer by the fact the Congress amended the TCPA in 2015 to expressly exempt calls and texts to collect on federal debts. In contrast, even manually dialed *telemarketing* calls by a live agent are subject to numerous restrictions not applicable to informational calls.[27] The Commission should take this opportunity to interpret an ATDS consistent with Congress's intent to protect legitimate business communications. Simply put, defining ATDS to sweep in devices beyond the statutory definition will not thwart telemarketers' and scammers' unsolicited calls; it will only fuel vexatious litigation against legitimate businesses for expected or desired communications.[28]

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[24] *See, e.g., id.* at 10.

[25] *See, e.g.*, 137 Cong. Rec. H11310 (daily ed. Nov. 26, 1991) (anticipating that the Commission will exempt calls that "leave messages with consumers to call a debt collection agency to discuss their student loan" because such messages do not "adversely affect the privacy rights" the TCPA was intended to protect) (statement of Congressman Markey).

[26] *See, e.g.*, 137 Cong. Rec. S18785 (daily ed. Nov. 27, 1991) (noting consumer "outcry over the explosion of unsolicited telephone advertising" and the "invasion of their privacy by unrestricted telemarketing") (statement of Sen. Pressler); *id.* ("The primary purpose of this legislation is to develop the necessary ground rules for cost-effective protection of consumers from unwanted telephone solicitations"). *See also* Comments of U.S. Chamber Institute for Legal Reform, CG Docket Nos. 18-152, 02-278, at 3 (filed June 13, 2018) ("Chamber June 13th Comments").

[27] 47 C.F.R. 64.1200(a)(2)-(3), (c), (d).

[28] *See, e.g.*, Chamber June 13th Comments at 5 ("trial lawyers have found legitimate, domestic businesses a much more profitable target" than "illegal telemarketers, the over-the-phone scam artists, and the foreign fraudsters.") (quoting Pai Dissent to 2015 Omnibus TCPA Order).

V. Conclusion.

For the reasons described above and in our previous comments, the *Marks* decision is unpersuasive, and adopting the Ninth Circuit's ATDS definition would only add to the TCPA morass. The Commission should instead clarify that equipment qualifies as an ATDS only if it actually possesses the functions expressly included in the statutory definition.[29] Additionally, only calls or texts made using this autodialing functionality are made "using" an ATDS. This interpretation would effectuate the purpose of the TCPA—deterring telemarketers from mass autodialing—while providing clear and much-needed guidance to good-faith callers and protecting consumers.

Respectfully submitted,

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[29] *See* Comments of SLSA, Navient, Nelnet, and PHEEA, CG Docket Nos. 02-278, 18-152, at 20-23 (filed June 13, 2018).